Northeast Industrial Service Company, Inc. ***and*** **Local Union 567, International Brotherhood of Electrical Workers, AFL–CIO** ***and*** **Local 1253, International Brotherhood of Electrical Workers, AFL–CIO.** Cases 1–CA–32444 and 1–CA–32459

March 20, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On October 5, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Northeast Industrial Service Company, Inc., Winthrop, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(b) and (c) and reletter the subsequent paragraph accordingly.

''(b) Threatening employees with disciplinary action for displaying union stickers or decals on their hardhats.

''(c) Issuing disciplinary warnings to employees for wearing union stickers or decals on their hardhats.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United states Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain or enforce a rule which prohibits the display of any union stickers or decals on our hardhats.

WE WILL NOT threaten employees with disciplinary action for displaying union stickers or decals on their hardhats.

WE WILL NOT issue any disciplinary warning to employees for wearing union stickers or decals on their hardhats.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revoke the warning issued to Alfred Macmaster for displaying a union sticker on his hardhat and WE WILL remove it from our files and notify him that this has been done and that this warning will not be used against him at any time in the future.

NORTHEAST INDUSTRIAL SERVICES COMPANY, INC.

Joseph F. Griffin, Esq., for the General Counsel.
Joseph J. Hahn, Esq. and *Kate S. Debevoise, Esq. (Bernstein, Shur, Sawyer & Nelson)*, of Portland, Maine, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were tried in Portland, Maine, on July 10, 1995, based on charges filed by Local Union 567, International Brotherhood of Electrical Workers, AFL–CIO, on December 27, 1994, as amended (Case 1–CA–32444), and by Local 1253, International Brotherhood of Electrical Workers, AFL–CIO, on January 4, 1995, as amended (Case 1–CA–32459), and a consolidated complaint issued by the Regional Director for Region 1 of the National Labor Relations

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find merit in the General Counsel's exception to the judge's failure to find that about December 20, 1994, the Respondent's supervisor, Carter, threatened employees with discipline if they did not remove union stickers from their hardhats. In this regard, we note that the Respondent in its answer to the consolidated complaint admitted the allegation. Further, at the hearing, the Respondent introduced into evidence a memorandum from Carter, stating that he informed an employee that the failure to comply with the Respondent's hardhat policy would mean that the employee would be sent home for the day. Additionally, Carter's undisputed testimony showed that about December 20, 1994, he threatened an employee in the presence of others that the failure to remove a union sticker from the employee's hardhat would result in disciplinary action. It is well established that the issuance of such a warning in the absence of special circumstances violates Sec. 8(a)(1). *Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. mem. 511 F.2d 527 (6th Cir. 1975).

[2] The judge inadvertently failed to include, in his recommended Order, language requiring the Respondent to cease and desist from issuing disciplinary warnings to its employees for wearing union stickers or decals on its hardhats. Accordingly, we shall modify the Order and substitute a new notice.

Board (the Board) on March 31, 1995. The complaint alleges that Northeast Industrial Service Company, Inc. (Respondent or NISCO) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by prohibiting employees from displaying union insignia on their hardhats and by disciplining an employee for violating that rule. Respondent denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and counsel for NISCO, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNIONS' LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a corporation, with an office and place of business in Winthrop, Maine, is engaged as a construction industry contractor with jobsites in Rumford and Jay, Maine, and elsewhere. Annually, in the course of its business, Respondent purchases and receives goods and materials valued in excess of $50,000 which are delivered to its Winthrop, Maine facilities directly from points located outside the State of Maine. The complaint alleges, the Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

NISCO provides construction, rehabilitation, demolition, and maintenance services primarily to firms engaged in the operation of papermills. Among the sites where it regularly works are International Paper's mill at Jay, Maine, and Boise Cascade's mill in Rumford, Maine. It employs varying numbers of workers in all of the construction crafts; its employees are not represented by any labor organizations.

At issue is whether Respondent's rules which prohibit the display of unapproved stickers on the hardhats worn by all employees interfere with Section 7 rights and whether its discipline of an employee for violating those rules contravenes Section 8(a)(3). The facts are not in dispute and will only be summarily stated.

B. *Facts*

In 1989, NISCO adopted an extensive set of safety rules intended to reduce an unfortunately high accident rate and consequently high premiums for workmen's compensation insurance. Included within those rules is a hardhat policy, mandating that all employees wear hardhats during all working hours.[1] That policy further provides:

> E. Only approved decals will be allowed on the hardhat. Anyone changing the appearance, or adding any unapproved substance to a NISCO hardhat, in addition to disciplinary action, may be required to pay a $15.00 fee.
>
> List of approved stickers or decals:
>
> 1. A 1/2'' DYMO style, self-adhesive label indicating the employee's first and last name.
>
> 2. A 2'' x 3'' Northeast Industrial sticker, place[d] on both sides, above the attachment cut-outs.
>
> 3. 1'' x 3'' colored label to indicate each craft . . . .
>
> 4. A 1'' high employee number.

As originally promulgated in 1989, the policy also provided for a safety decal bearing the logo of the Associated General Contractors (AGC), to be placed immediately above the employee number on the rear of the helmet. That decal was eliminated in about 1992 to avoid an unfair labor practice charge alleging that by allowing an AGC decal, while prohibiting the IBEW's, the Employer was treating the Unions disparately. At that time, it was decided to eliminate the AGC decal, rather than allow both it and the Unions', to prevent proliferation of decals on the hardhats.

When employees begin work, NISCO issues hardhats, blue in color to designate that they are NISCO employees; other contractors use different colors. NISCO's hardhats bear the stickers or decals described above, i.e., the employee's name in 1/2-inch lettering in front, the employer's name on 2-by-3-inch stickers or painted on above each ear, 1-by-3-inch colored decals on each side of the center line at the top of the hat (only on larger projects), and the employee's permanently assigned number, in 1-inch figures, at the back.

Respondent explained that it requires and provides a standardized hardhat because it hires employees from all over the country; they sometimes come with helmets of varying materials and in varying conditions. Standardizing allows it to know the condition of the helmets and to attach standardized safety accessories. The color of the hat and the craft labels allow it to see where its employees are working and the NISCO decals identify its employees to others. The prohibition of other decals or stickers on those hats, it asserts, is primarily a safety measure; secondarily, it is intended to maintain the Company's professional image.

Thus, with respect to safety, Respondent notes that the hardhats get dropped, banged up, and placed under other equipment when put away at the end of a shift. They sometimes suffer cracks, gouges, and dents which may impair their effectiveness. While it makes no specific inspections of hardhats and other personal equipment for such defects, its supervisors and safety personnel visually observe the hardhats as they walk through the jobsites. Stickers which are placed on a hat in addition to those required by its policy impair the ability to see whether the hat has been damaged, NISCO maintains. On occasion, employees whose hats showed damage or were excessively dirty have been directed to swap their hats for new ones.

In mid-December 1994, Respondent had crews working at both International Paper in Jay, Maine, and Boise Cascade in Rumford, Maine. On those crews were several journeymen electricians, members of either Local 567 or Local 1253, IBEW. At the Unions' urgings, those employees placed stickers on the backs of their hardhats, above their employee numbers, where the AGC sticker had earlier been displayed. Those union stickers were round, either 1 or 3 inches in diameter, red, white, black, and gold in color, and bore the

[1] Also required are safety glasses and safety (steel-toed) shoes.

IBEW's logo, consisting of its name and date of organization, with a hand holding bolts of lightning. The intent in affixing those decals was ultimately organizational, to identify those who were union members so that other employees could ask questions of them.

The IBEW stickers were quickly noticed by management, as were some other unrelated stickers. The issue was immediately addressed in regularly scheduled safety meetings where the hardhat policy was read to the employees without any reference to the fact that some of them were wearing IBEW stickers. The employees were told, individually and in those meetings, to remove the offending stickers. When they asked, they were told that discipline would result from a refusal to comply. One employee, Alfred Macmaster, was directed to remove a safety sticker provided by the mill, as well as the IBEW sticker, from the outside of his hat. He asked for something in writing. On the following day, Macmaster was given a first (written) verbal warning stating: ''Displaying other than Company stickers on hardhat (Stickers are identified in employee handbook).'' It indicated that a second violation would result in time off and a third would bring about his termination. The employees were not otherwise disciplined and those who voluntarily quit thereafter were rated as eligible for rehire. One went on to another NISCO jobsite.

Respondent does not prohibit employees from wearing union insignia on their work clothes or from displaying them on their lunch and toolboxes or other equipment. Employees have worn jackets and T-shirts with union logos and placed union stickers on their personal equipment, without suffering any adverse response from management.

C. *Analysis*

The Board has spoken repeatedly concerning the right of employees to wear union insignia while at work. Recently, in *United Parcel Service*, 312 NLRB 596, 601 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994), it stated:

> It is well established that an employee has the protected right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In the absence of ''special circumstances,'' the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act. See, e.g., *Ohio Masonic Home*, 205 NLRB 347, enf. mem. 511 F.2d 527 (6th Cir. 1975).

It has also stated that ''a rule which curtails that employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety.'' *Kendall Co.*, 267 NLRB 963, 965 (1983).

Such special circumstances, to the extent relevant here, include situations where the wearing of the insignia might ''jeopardize employee safety . . . or unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees.'' *United Parcel Service*, id., citing *Nordstrom, Inc.*, 264 NLRB 698, 700–702 (1982); and *Kendall Co.*, id. What is called for is a balancing of the conflicting rights, i.e., the employees' organizational rights against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances. *Standard Oil Co. of California*, 168 NLRB 153, 161 (1968), citing *Fabritek, Inc.*, 148 NLRB 1623 (1964), enf. den. 352 F.2d 577 (8th Cir. 1965).

A balancing of the competing interests leads me first to conclude that Respondent's ''image'' argument is without merit. Respondent has alluded to no dress code or other requirement that its construction employees adhere to any standard of neatness or uniformity. Rather, it has adduced evidence that union insignia are permitted on clothing, other than hardhats, and on equipment; it has not shown how such an additional display on the hardhat would adversely impact on its image. Nor has it shown that the IBEW decals at issue were particularly conspicuous or provocative. See *United Parcel Service*, supra, and *Nordstrom, Inc.*, supra. Further, the employees have no public contact and only limited contact with representatives of the mills which are Respondent's customers. See *Malta Construction Co.*, 276 NLRB 1494, 1495 (1985).[2] It is, moreover, arguable that decals which identify its craft workers as union members, and therefore graduates of, or participants in, established apprenticeship programs, enhances rather than detracts from a construction industry employer's professional image.

A more difficult question is presented by Respondent's safety concerns. Counsel for the General Counsel relies principally on *Malta Construction Co.*, supra, and would distinguish the cases relied on by Respondent, *Andrews Wire Corp.*, 189 NLRB 108 (1971), and *Standard Oil*, supra.[3] A brief discussion of each case is warranted.

In *Standard Oil*, the employer had a longstanding rule, based on safety concerns, prohibiting the adorning of its hardhats with stickers or decals, whether union related or not. Those hats were a near fluorescent orange, visible at long distances to the employer and equipment drivers. Its worksite was a refinery where ''highly volatile, dangerous, and hazardous gases necessitated an elaborate safety precaution system.'' *Malta*, supra at fn. 4. Similarly, in *Andrews Wire*, the employer issued bright, highly visible hardhats in a poorly lighted working environment. In each case, the employer asserted that less bright decals placed on those hats would diminish their visibility and impair safety. In each, the employees were permitted to display union insignia on any item of clothing other than their hardhats and they did so.[4] Of note is the following language adopted by the Board in *Standard Oil*:

> The safe management . . . is a heavy responsibility on the Company which it may not shirk. As the court said in *Harrah's Club* [337 F.2d 177, 180 (9th Cir. 1964)] in regard to a similar decision of management:

[2] Incorrectly rendered in the transcript as Mault Construction; the record is corrected accordingly.

[3] Inferentially, counsel for the General Counsel would also distinguish the instant situation from *Kendall Co.*, supra, on which Respondent also relies. In that case, for obvious safety reasons, the employer prohibited loose or hanging jewelry which could catch in machinery. The Board found ample support for that employer's safety based rule.

[4] It is a minor distinction that, in *Standard Oil* and *Andrews*, the employees were expressly told that they were permitted to wear insignia on the other clothing. While no such statements were made here, the employees obviously knew that was permitted by NISCO and they availed themselves of the opportunities to do so.

> This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable and does not interfere with a protected purpose.

In *Malta Construction*, supra, an employee was terminated after he persisted in wearing union stickers on his company provided hardhat in contravention of the employer's orders. In that case, as here, the employer allowed its employees to wear union insignia on their personal attire and there was no showing of disparate treatment. The primary issue presented there was whether the employer had the right to deny the use of company property for union-related purposes. The Board, citing *Republic Aviation*, supra at 797–798, noted that ''[T]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity.'' It further noted its statement in *Kendall Co.*, supra at 965, that ''a rule which curtails that employee right is presumptively invalid unless special circumstances make the rule necessary to maintain production or discipline, or to ensure safety.''

In *Malta*, supra, as in *Standard Oil* and *Andrews*, supra, the employer claimed that its bright orange colored hats aided it in distinguishing its employees from those of other contractors and assisted operators and drivers in spotting employees working around their equipment. That employer further claimed that employees would not stop with just one or two stickers on the hardhats but might cover them with stickers, some of which might be vulgar or offensive to the public with whom the employees might come in contact. The Board, however, noted that the employees worked outdoors during the daytime, that nothing impaired respondent's ability to observe its employees, and that the employee in question wore only two stickers which did not obscure the color of the helmet. It also pointed out that the employer was able to identify its foremen although they wore less noticeable hardhats.

Thus, the Board concluded that the respondent had ''failed to prove that the complete prohibition of insignia on its hardhats was necessary to enable it to identify its employees.'' It also concluded that, in the circumstances of the construction industry, the ''public contact'' argument was not established by the evidence. It therefore rejected the employer's claim that ''special circumstances based upon legitimate production or safety reasons'' existed to justify its prohibition. The rule and its enforcement were deemed violative of Section 8(a)(3) and (1).

In the instant case, the Employer has asserted that the placement of stickers, either 1 or 3 inches in diameter, impairs its ability to determine, during casual inspections, whether the integrity of the hardhats has been impaired. Without making any measurements, it is fair to state that even the larger of those stickers would cover less than a tenth of the hat's surface. Respondent has not claimed or shown that the employees have placed multiple stickers on the hats. Neither has it shown so great a safety-related concern for dented, gouged, or otherwise damaged hardhats that it would institute regular and closer inspections of them. The record evidence, moreover, reveals that Respondent had previously allowed a similarly sized sticker to be placed on the identical spot on the helmet where the IBEW members sought to display their union logos. That sticker, promoting safety and the AGC, was subsequently prohibited, not for safety reasons but only because its presence might legitimate demands to place union stickers on those hats. If the AGC sticker did not impair inspection of the hardhats than the Unions' stickers cannot be said to do so, and Respondent's safety-based claims must fall.

Based on the foregoing evidence, I must conclude that the instant case is closer to *Malta Construction* than it is to *Standard Oil*, *Andrews*, or *Kendall*. Management's claim of a safety-based justification for its rule does not withstand scrutiny. There is no ''reasonable'' safety-related rule (within the contemplation or meaning of the quote from *Harrah's* and *Standard Oil* set forth above) which would bar a substitution of agency judgment. Thus, I must conclude, ''Respondent has failed to establish any special circumstances based on legitimate production or safety reasons to justify prohibition.'' *Malta Construction*, supra at 1495. I therefore find that the enforcement of Respondent's hardhat rule violates Section 8(a)(1) to the extent that it prohibits the placement of any union insignia on those hats.[5] I further find that by disciplining Alfred Macmaster for violation of that rule, it has violated Section 8(a)(3).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminated against an employee engaged in union activity by issuing a warning to him for wearing a single union sticker on his hardhat, I find that it must revoke that warning and remove it from its files and notify him in writing that it has done so and that this warning will not be used against him in the future in any way.

CONCLUSIONS OF LAW

1. By maintaining and enforcing a rule prohibiting employees from placing any union stickers or decals on its hardhats, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a warning to Alfred Macmaster for violating its rule prohibiting the display of any union stickers or decals on its hardhats, the Respondent violated Section 8(a)(3) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

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[5] I have no doubt but that application of the rule would be held valid were employees to plaster the hardhats with stickers of sufficient size and number so as to preclude management from seeing its color or from eyeballing it for defects. That, however, is not the case here and I would be loath to see such a situation arise. The Unions would waste their own assets and this Agency's limited resources to continuously test this issue by trying to see how many stickers, and of what size, it could display before the rule could be validly applied.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Northeast Industrial Service Company, Inc., Winthrop, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule which prohibits the display of any union stickers or decals on its hardhats.

(b) In any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke the warning issued to Alfred Macmaster for displaying a union sticker on his hardhat and remove it from its files and notify him that this has been done and that this warning will not be used against him at any time in the future.

(b) Post at its facility in Winthrop, Maine, and its jobsites in Jay and Rumford, Maine, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''